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THE NLRB’S SOCIAL MEDIA GUIDELINES A LOSE-LOSE: WHY THE NLRB’S STANCE ON SOCIAL MEDIA FAILS TO FULLY ADDRESS EMPLOYER’S CONCERNS AND DILUTES EMPLOYEE PROTECTIONS

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PART I: INTRODUCTION

The continued expansion in both personal and professional social media use has resulted in social media having a growing and unique impact on the workplace.² There are many recent and remarkable examples of individuals using social media to vent workplace frustrations or occupational dissatisfaction, which in turn has caused significant conflict between the individual and his/her employer.³ In fact, some employment actions arising from an employee’s social

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² See Sheryl Jaffe Halpern & Charles H. Gardner, *NLRB offers long awaited guidance on social media policies*, EMPLOYEE BENEFIT NEWS (Dec. 21, 2012), http://ebn.benefitnews.com/news/nlrb-offers-long_awaited-guidance-social-media-policies-2729827-1.html; see also Nichole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 JOURNAL OF COMPUTER MEDIATED COMMUNICATION 210, 211 (2007) (defining social network sites as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site).

³ *E.g.*, *Jaszczyszyn v. Advantage Health Physician Network*, 2012 U.S. App. LEXIS 23162 (6th Cir. Nov. 7, 2012) (holding that the company had not retaliated against an employee who had taken intermittent leave and had not interfered with her rights under the Family Medical Leave Act when the company fired the

media use have become so contentious that a number of employers have been charged with unfair labor practices under the National Labor Relations Act for overly broad social media policies that allegedly implement unfair workplace policies and practices.⁴ With a drastic increase in the number of unfair labor practice allegations over employers' control of employees' social media use, the National Labor Relations Board ("NLRB") issued guidelines on the acceptable scope and breadth for employer social media policies, which were consistent with several important Board decisions.⁵ As social media's popularity and versatility grows, it is important to understand how the NLRB's guidelines view employment related social media policies, how social media policies can impact an employee's social media use, and the potential invasion these policies can have on an employee's established rights under the National Labor Relations Act.

This article first examines social media use in the workplace by defining social media and then examining how social media is used. The article then reviews recent NLRB Board decisions regarding social media issues, analyzes the NLRB's published guidance on social media policies, and discusses how the NLRB's actions may impact employees' social media use. Finally, the article argues that because the NLRB's stance on social media allows employers to both monitor and analyze an employee's social media use, the NLRB's current guidance on social media policies fails to adequately address employers' social media concerns while also diluting employees' rights to communicate regarding workplace concerns.

PART II: DEFINING SOCIAL MEDIA

Although the concept of "social media" encompasses a wide variety of online applications, social media in its most basic form is a virtual community or network that allows people to connect via the Internet and create, share, or

employee for fraud following an investigation and examination of the employee's Facebook postings).

⁴ Denise Barton Ward, *Board Approves Code of Conduct Policy*, LABOR MANAGEMENT RELATIONS PRACTICE GROUP (Mar. 20, 2013), <http://www.littler.com/nlr-decisions/board-approves-code-of-conduct-policy/>.

⁵ Throughout this article, the terms "NLRB," "Board," and "NLRB Board" shall be used interchangeably to refer to the National Labor Relations Board.

exchange information.⁶ The most common way individuals engage in social media activities is through web-based applications that allow users to personalize, post, and control their own individualized content.⁷ Some popular, and perhaps the most commonly known, social media applications include Facebook, Instagram, Twitter, and YouTube.⁸ Facebook is so popular that as of January 2009, the social media network had over 175 million active users and 400 million users total.⁹ Facebook even reported that the site had “864 million daily active users on average for September 2014” and “1.12 billion mobile monthly active users as of September 30, 2014.”¹⁰ Twitter, another very popular social media site, reports that throughout 2014 it has had over 284 million monthly active users.¹¹ To put this in perspective, one-sixth of the world’s population actively maintains an online account with Facebook or Twitter.¹² These statistics demonstrate that social media has a diverse appeal and allows for almost everyone to find a social media

⁶ Jacques Bughin, et. al., *How social technologies are extending the organization*, THE MCKINSEY QUARTERLY, 2-8 (2011); *see also* Andreas M. Kaplan, *Users of the world, unite! The challenges and opportunities of social media*, 53 BUSINESS HORIZONS 59, 61 (2010) available at <http://michaelhaenlein.com/Publications/Kaplan,%20Andreas%20-%20Users%20of%20the%20world,%20unite.pdf> (stating there are six classifications of social media: collaborative projects, blogs, micro-blogs, content communities, social networking sites, virtual game worlds, and virtual social worlds).

⁷ *See* Kaplan, *supra* note 5.

⁸ Kaplan, *supra* note 5.

⁹ Kaplan, *supra* note 5; *see also*, Devon Glenn, *The History of Social Media from 1978-2012*, SOCIAL TIMES (Feb. 16, 2012) http://socialtimes.com/the-history-of-social-media-from-1978-2012-infographic_b89811.

¹⁰ *Newsroom*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Nov. 26, 2014).

¹¹ *About Twitter*, TWITTER, <https://about.twitter.com/company> (last visited Nov. 26, 2014).

¹² *Facts and figures about Facebook on its 10th year*, GMA NEWS ONLINE (Feb. 2, 2014), <http://www.gmanetwork.com/news/story/346629/scitech/socialmedia/facts-and-figures-about-facebook-on-its-10th-year>.

application that fits with their unique interests through various forms of blogs, forums, message boards, wikis, virtual worlds, and digital sharing.¹³

Following the introduction of social media applications, Internet use drastically changed.¹⁴ Facebook, the largest and most recognized social media application, accounts for ten percent of all web pages viewed in the United States, and continues to increase its popularity with new users every year.¹⁵ Internet users now spend more time using social media sites than any other type of Internet site available.¹⁶ In fact, for many users, social media sites are now the individual's primary source of news, community updates, resources, and entertainment.¹⁷ Social media use on both personal computers and mobile devices has therefore increased steadily in the United States from 88 billion minutes in July of 2011 to over 121 billion minutes in July 2012.¹⁸ Some studies in 2013 even estimated that Americans spent an average of forty minutes per day on Facebook alone, using both personal computers and mobile devices.¹⁹ On average, four out of five Americans use the Internet daily, with the majority of these users engaging

¹³ Anthony Curtis, *The Brief History of Social Media*, MASS COMMUNICATION DEPT., UNIVERSITY OF NORTH CAROLINA AT PEMBROKE, <http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html> (last visited Nov. 26, 2014).

¹⁴ *Id.*

¹⁵ Geoffrey A. Fowler, *Facebook: One Billion and Counting*, THE WALL STREET JOURNAL (Oct. 4, 2012), <http://online.wsj.com/article/SB10000872396390443635404578036164027386112.html>; see also Mauve Duggan & Aaron Smith, *Demographics of Key Social Networking Platforms*, PEW RESEARCH INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/demographics-of-key-social-networking-platforms/>.

¹⁶ *State of the Media: The Social Media Report of 2012*, NIELSEN (Dec. 4, 2012), <http://www.nielsen.com/us/en/reports/2012/state-of-the-media-the-social-media-report-2012.html>; see also, Duggan & Smith, *supra* note 14.

¹⁷ See, e.g., *The Rise of Social Networking*, ITU NEWS (Aug. 2010), <http://www.itu.int/net/itunews/issues/2010/06/35.aspx>.

¹⁸ Kaplan, *supra* note 5.

¹⁹ *Fun Facts*, IACP CENTER FOR SOCIAL MEDIA, <http://www.iacpsocialmedia.org/Resources/FunFacts.aspx> (last visited Nov. 28, 2014).

primarily in social media activities.²⁰ In fact, in 2010, twenty-two percent of all Internet use was specific to online social media applications.²¹ Since 2010, social media use has jumped to an average of 3.2 hours per day.²² The accessibility of social media on mobile devices has only enhanced social media use, with seventy-one percent of mobile consumers reporting that they used their cellphones to access social media applications on a daily basis.²³

PART III: SOCIAL MEDIA IN THE WORKPLACE

The pervasive nature of social media has led to social media becoming a technological tool for both employers and employees. Currently, seventy-nine percent of Fortune Five Hundred Companies use social media applications or corporate blogs to communicate with customers, stakeholders, and the general online community.²⁴ Employers are also using social media as a tool to evaluate candidates for employment and review credentials. A 2007 study showed nearly forty-five percent of employers regularly used questions about applicants' use of social media activities as a method of screening potential job candidates.²⁵ Another

²⁰ Kenneth L. Hardison, *Avoid Social Media Pitfalls*, TRIAL (July 1, 2012), <http://www.highbeam.com/doc/1G1-312290075.html>.

²¹ Nicky Jatana et. al., *Advising Employers on the Use of Social Media in the Workplace*, 34 LOS ANGELES LAWYER 12 (2012).

²² *Social Networking Eats Up 3+ Hours Per Day For The Average American User*, MARKETING CHARTS (Jan. 9, 2013), <http://www.marketingcharts.com/online/social-networking-eats-up-3-hours-per-day-for-the-average-american-user-26049/> (stating that the average social media user spends at least three hours a day looking at social media sites).

²³ *Adobe 2013 Mobile Consumer Survey Results*, ADOBE (Jun. 2013), http://success.adobe.com/en/na/programs/products/digitalmarketing/offers/june/1306-35508-mobile-consumer-survey-results.html?s_osc=701a0000000mynJAAQ&s_iid=.

²⁴ Jatana, *supra* note 20.

²⁵ Jatana, *supra* note 20 (providing that of these employers, thirty-five percent of surveyed participants reported that they had denied positions to applicants based on content found on the candidate's social networking site. The study also reported that while Facebook was the most popular online destination for screening applicants, seven percent of employers also followed job candidates on Twitter. Over fifty percent of the employers surveyed attributed their decision not to hire on

survey from 2011, revealed forty-four percent of companies track employees' use of social media both in and outside of the workplace.²⁶ In a more recent study by Careerbuilder in 2013, fifty one percent of employers reported researching job candidates on social media and reported finding content that caused them to reject a candidate.²⁷

Employers are not, however, the only ones whose access to social media has impacted the workplace. With the average employee spending between one to two hours each day on the Internet for personal use, employees have increasingly used social media at work or during company hours.²⁸ Once social media applications became accessible on mobile devices, use of social media at work increased dramatically. One recent study revealed over fifty percent of social media updates were performed using mobile devices during work hours.²⁹ This same study also revealed that fifteen percent of the social media updates made from mobile devices during the hours of 9 a.m. to 5 p.m., or working hours, were actually made from an

the presence of provocative photos, references to drinking and drug use, and badmouthing of previous employers or colleagues); *see also* Scott Brutocao, *Issue Spotting: The Multitude of Ways Social Media Impacts Employment Law and Litigation*, 60 THE ADVOC. 8 (2012) (showing through recent studies a large majority of employers, over fifty-six percent, incorporated social media information into hiring decisions).

²⁶ Lauren Fisher, *44% of Companies Track Employees Social Media Use in AND out of the Office*, TNW (Aug. 17, 2011), <http://thenextweb.com/socialmedia/2011/08/17/44-of-companies-track-employees-social-media-use-in-and-out-of-the-office/>.

²⁷ *Number of Employers Passing on Applicants Due to Social Media Posts Continues to Rise, According to New CareerBuilder Survey*, CAREERBUILDER (Jun. 26, 2014), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=6%2F26%2F2014&id=pr829&ed=12%2F31%2F2014>.

²⁸ Sharon Gaudin, *Study: Facebook use cuts productivity at work*, COMPUTER WORLD (Jul. 22, 2009), http://www.computerworld.com/s/article/9135795/Study_Facebook_use_cuts_productivity_at_work.

²⁹ Ethan Zelizer, *Embracing and Controlling Social Media in the Workplace*, YOUNG LAWYERS JOURNAL (Oct. 2010), *available at* <http://www.digitaladedge.net/publication/repo27/14625/49921/49921-52.pdf>.

employer provided mobile device.³⁰ Social media use is so popular that an individual's daily social media use is likely to be more prevalent than even his or her use of personal email.³¹ High rates of social media use occurring during work hours and with workplace equipment has further led to employers' concern about social media use from the perspective of both productivity and context.

Often, the largest concern for employers regarding social media is the context with which employees are discussing workplace information, largely because productivity issues related to social media can be managed easily.³² For example, Internet blocking tools and application program managers can help regulate the types of Internet sites and apps that can be accessed on an employer issued device. Context and substance, in contrast, is difficult to manage because employees using social media can easily discuss a variety of workplace information, such as company executives, products, business practices, ethics, clients, or the workplace itself without the company's awareness.³³ Even if comments about the employer or other workplace-related issues are made on an individual's private social media page, the manner in which the information is shared is such that a substantial number of people, and potentially anyone, can read these postings. Furthermore, even when information is shared "privately" or with a select group of "friends," the substance or content shared, whether good or bad, could heavily impact the employer.³⁴ Employers are therefore actively monitoring social media use and, at times, making employment decisions based on the results of such monitoring.³⁵

³⁰ *Id.*

³¹ *Id.* (noting social media is the fourth most popular online activity, which surpasses even the popularity of checking personal email).

³² Dennis J. Alessi, *Social Media: Why Every Employer Needs to be Concerned and Proactive*, H.R. BLR (Feb. 18, 2013), <http://hr.blr.com/whitepapers/HR-Administration/Electronic-Monitoring/zn-Social-media-Why-employers-concerned-proactive>.

³³ *Id.*

³⁴ See, e.g., Rachel Charlton-Dailey, *Your Employer Likes This-How Social Media Can Affect Employment*, SPOTLIGHT ON SOCIAL (May 26, 2013), <http://spotlightonsocial.wordpress.com/2013/05/26/your-employer-likes-this-how-social-media-can-affect-employment/> (discussing generally how an employee's post regarding an opinion of the company, its managers or supervisors, or product could negatively impact the company).

³⁵ See *Number of Employers Passing on Applicants*, *supra* note 26.

There are numerous examples of how social media has transformed employment relationships, such that comments or images posted on social media about, or relating to, an employer are frequently factors in employment actions. Several more prominent and recent examples of employment actions taken because of an employee's social media use include: Rap Genius's termination of its CEO after he made comments on Facebook about the California shooter, Applebee's termination of Chelsea Welch after she posted a receipt on the online website Reddit, KFC's termination of a worker for posting a photo of her licking a bowl of potatoes on several social media sites, and the termination of White House Aide Jofi Joseph for his derogatory comments regarding White House operations on Twitter.³⁶

Given that the majority of employment relationships are governed by the doctrine of "employment-at-will," which essentially holds that employees can be fired for "good reason, bad reason, or no reason at all," employment actions taken against employees for social media use are generally viewed as acceptable.³⁷ An

³⁶ See Jessica Miller-Merrell, *History of Terminations & Firings Because of Employee Social Media Use*, BLOGGING 4 JOBS (May 7, 2013), <http://www.blogging4jobs.com/social-media/history-of-terminations-firings-employee-social-media/>; see also Brutocao, *supra* note 24, at 11 (providing the additional examples of: a Wal-Mart cashier who was terminated for denigrating the IQ of company representatives, two Domino's Pizza employees fired for food tampering after they posted YouTube videos sneezing on ingredients and stuffing cheese up their nostrils, and a Goldman Sachs employee who was terminated for spending four hours per day on Facebook while at work); Alexander Naito, Comment, *A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees' Social Media Use*, 14 U. PA. J. CONST. L. 849, 850 (2012); Patricia Sanchez Abril et. al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 68-69 (2012) (discussing how a recent study reported medical students regularly engaged in unprofessional dialogue about patients on social media sites).

³⁷ See generally Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW (Jan. 15, 2001), available at <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf>. See also Bryan Russell, Article, *Facebook Firings and Twitter Terminations: The National Labor Relations Act As A Limit on Retaliatory Discharge*, 8 WASH. J.L. TECH. & ARTS 29 (2012) (stating in every state except Montana, at-will employment is the default rule, leaving employers free to discharge employees for their use of social media).

employer's use of social media content for an employment action, may however, be the basis of a civil action for discrimination, retaliation, invasion of privacy, and other employment related claims.³⁸ Employees protected by an individual contractual relationship with the employer or Collective Bargaining Agreement ("CBA")³⁹ may also have contractually established expectations of privacy in social media use that if violated could constitute a breach of contract by the employer or an unfair labor practice under the National Labor Relations Act ("NLRA").

PART IV: CHALLENGES TO EMPLOYMENT RELATED ACTIONS FOR EMPLOYEES' USE OF SOCIAL MEDIA

Presently, no federal law restricts an employer from monitoring or using social media activities for employment related decisions, unless those decisions involve discrimination, retaliation, or some other protected form of communication, such as communication covered by federal labor laws.⁴⁰ Several states have therefore taken the initiative to define social media use within the employment relationship through proposed legislative protections related to an employee's Internet privacy.⁴¹ For example, Maryland, Michigan, Illinois, and California have enacted specific legislation prohibiting employers from asking employees to provide social media information at the time of their application for employment, or during the course of their employment.⁴² Several other states,

³⁸ Brutocao, *supra* note 24, at 8.

³⁹ Russell, *supra* note 36 (discussing that unless otherwise negotiated, at-will employment is the default rule, and employees may be terminated for their use of social media).

⁴⁰ Dylan Scott, *Legislating Social Media in the States*, GOVERNING THE STATES AND LOCALITIES (July 2012), <http://www.governing.com/topics/technology/legislating-social-media.html> (noting Congress voted down one password protection proposal in March but another has since been introduced); *see also Legislative Social Media Policies and Resources*, NCSL (Mar. 26, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/policies-related-to-legislative-use-social-media.aspx>.

⁴¹ *Id.*

⁴² Philip Gordon, *Michigan's New "Social Media Password Protection" Law Multiplies the Challenges for Employers Seeking to Investigate Employees' Social*

including New York, South Dakota, and California have also issued guidelines for employer-enacted social media policies.⁴³

Although the legislative enactments of these states demonstrate that there is a concern related to social media in and about the workplace, most states have not implemented any additional legislative protection for employees' statements on social media that concern or relate to employment related issues.⁴⁴ Employees seeking to challenge employment decisions based on social media use through civil action are therefore limited by the doctrines of at-will employment and reasonable expectations of privacy.⁴⁵ Consequently, judicial evaluation of employment decisions resulting from a challenge to social media use has primarily resulted from civil suits against employers alleging a breach of contract, or union based grievances alleging unfair labor practices under an applicable CBA, or more generally under the National Labor Relations Act.⁴⁶

With regards to CBAs, collective bargaining units and unions have historically ignored social media protections during CBA negotiations with employers. In most cases, unions viewed social media as an inconsequential bargaining item, because it was not ubiquitous in an employee's workplace or home.⁴⁷ Instead, most CBAs refer only to the standard limitation on employee

Media Misconduct, PRIVACY AND DATA PROTECTION PRACTICE GROUP (Jan. 2, 2013), <http://privacyblog.littler.com/tags/maryland/>.

⁴³ *Legislative Social Media Policies and Resources*, *supra* note 39.

⁴⁴ Scott, *supra* note 39 (summarizing proposed legislative protections as dealing primarily with employment screening and hiring decisions, not content based determinations).

⁴⁵ Scott, *supra* note 39; *see also* Frank J. Cavico et al., *Social Media and Employment-At-Will: Tort Law and Considerations for Employees, Managers and Organizations*, 11 NEW MEDIA AND MASS COMMUNICATION 25 (2013), available at <http://www.iiste.org/Journals/index.php/NMMC/article/view/4605/4998>.

⁴⁶ *See generally* Baker & McKenzie, *Labor Year in Review: NLRB targets non-unionized employers and expands worker rights*, ASSOCIATION OF CORPORATE COUNSEL (Dec. 21, 2013), <http://www.lexology.com/library/detail.aspx?g=919b3459-e11a-45bf-ad5b-2e73c5a5e729> (discussing the NLRB's extensive and primary review of social media policies, even in cases involving a non-unionized employer).

⁴⁷ *Id.*

termination for “just cause.”⁴⁸ The fairly broad and vague determination of “just cause” encompasses many behaviors, such as harassment, complaining, slander, and disclosure of workplace practices, that when these behaviors are exhibited within social media, even if done with the expectation of privacy, there is sufficient cause for an employer to terminate an employee protected under a CBA.⁴⁹ Additionally, even when social media use has not been defined within a CBA, employees may still be protected if their social media use qualifies as protected activity under Section 7 of the NLRA.⁵⁰

Under Section 7 of the NLRA, employees have the right to self-organize, form, join or assist labor organizations, bargain collectively through chosen representatives, and engage in concerted activities.⁵¹ Section 8 of the NLRA enforces these rights by prohibiting employers from interfering, restraining, or coercing employees from exercising their Section 7 rights.⁵² By applying Section 7 and Section 8 of the NLRA to social media use, employees’ social media activity is arguably protected by the NLRA when the employee’s social media activity relates to his or her exercise of Section 7 rights. This argument is not a new one in labor law. For example, in 2004 the NLRB’s decision in *Lutheran Heritage Village-Livonia* held that an employment policy or rule is unlawful under the NLRA if the policy explicitly prohibits or restricts employees from engaging in Section 7 activities.⁵³ The NLRB’s reasoning in *Lutheran Heritage Village-Livonia* suggests that any policy, even a social media policy, which negatively impacts an employee’s exercise of Section 7 activities, will be considered unlawful under the NLRA.

⁴⁸ See generally Patrick R. Westercamp & Rebecca Esmi, *Arbitrating Social Media Grievances*, 269 NEW JERSEY LAWYER 28, 32 (Apr. 2011), available at http://www.esmilaw.com/images/Arbitrating_social_media_cases2011.pdf (providing a discussion on the review of social media under the lens of “just cause”). See also, e.g., Michael Weiner & Jay Smith, *Employees’ Legal Rights to Talk about Work on Social Media*, AMUSEMENT AREA EMPLOYEES UNION LOCAL B-192 (Feb. 19, 2013), <http://b192iatse.org/socialmedia%20FAQ.htm> (providing the general guidance for union evaluation of social media related decisions under the CBA’s standard “just cause” requirement).

⁴⁹ Russell, *supra* note 36, at 30.

⁵⁰ Russell, *supra* note 36, at 32.

⁵¹ National Labor Relations Act, 29 U.S.C. § 157 (2006).

⁵² *Id.* §158(a)(1).

⁵³ *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646 (2004).

The NLRB's analysis of social media policies under the NLRA is highlighted in three primary Board decisions. The first Board decision occurred in September 2012 through the NLRB's decision in *Costco Wholesale Corp.*⁵⁴ In *Costco Wholesale Corp.*, the employer's social media policy specifically prohibited employees from posting damaging statements about the company on social networking sites.⁵⁵ Costco's policy stated:

Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.⁵⁶

Even though an administrative law judge ("ALJ") had originally found the policy consistent with the NLRA, the NLRB disagreed with the ALJ's decision on appeal and found employees would reasonably construe Costco's policy as prohibiting NLRA-protected activity.⁵⁷ The NLRB reasoned that because a broad prohibition against any statements that "damage the Company" or "damage any person's reputation" could include employees' statements made in protest of Costco's treatment of employees, employees could infer from the policy that they were not permitted to engage in certain protected communications, particularly statements criticizing Costco.⁵⁸ The NLRB therefore held that Costco's social media policy violated the NLRA because employees could interpret Costco's policy as prohibiting them from engaging in protected activity.⁵⁹

Shortly after *Costco Wholesale Corp.*, the NLRB issued a second social media decision in *Knauz BMW*.⁶⁰ In *Knauz BMW*, the NLRB considered two

⁵⁴ *Costco Wholesale Corp.*, No. 34-CA-012421, 2012 N.L.R.B. Lexis 534 (Sept. 7, 2012).

⁵⁵ *Id.*

⁵⁶ *Id.* at 2.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 3.

⁶⁰ *Knauz BMW, Inc.*, No. 13-CA-046452, 2012 N.L.R.B. Lexis 679 (Sept. 28, 2012).

issues, the employer's social media policy and the employer's termination of an employee for content posted on his Facebook.⁶¹ Although the NLRB determined the employer's social media policy was unlawful under the NLRA, the NLRB nevertheless found that the employee's termination for inappropriate social networking activity was lawful.⁶² In reviewing the company's social media policy, the NLRB Board evaluated Knauz BMW's "courtesy" rule, which stated:

Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language, which injures the image or reputation of the Dealership.⁶³

After analyzing the employer's courtesy rule, the NLRB Board recognized that while employers have a legitimate interest in ensuring employees behave professionally in both workplace and public settings, the courtesy rule was nevertheless unlawful due to its breadth.⁶⁴ In finding the rule unlawful, the NLRB reasoned that even though the employer had a legitimate interest in ensuring its employees were respectful and courteous, because employees could construe the policy to prohibit protected communications, such as criticism of working conditions, the rule was overly broad.⁶⁵

Despite concluding that the employer's social media policy was unlawful, the NLRB found the company's termination of one of its car salesmen for posting inappropriate and unprofessional pictures and comments on Facebook regarding a car accident that had occurred at an adjacent car dealership, justified.⁶⁶ The NLRB Board held the Facebook posting was "obviously" not protected by the NLRA because the terminated salesman's commentary did not involve any discussion of

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (noting, specifically, that in addition to maintaining a strong public image, employers also have a legitimate interest in protecting trade secrets and confidential business information).

⁶⁵ *Id.*

⁶⁶ *Id.* at 18.

employment terms or conditions.⁶⁷ Consequently, the salesman could be lawfully terminated for the posted content.⁶⁸ The NLRB's analysis did not stop there, however, as the Board offered a clarifying example for when a termination would be unlawful by stating that had the salesman's posts related to low-quality food served at the employer's marketing event, which was held at the same time of the car accident, the salesman would have been protected from termination because the hypothetical posting could have reasonably constituted NLRA-protected activity.⁶⁹

In the third, and perhaps the most expansive, NLRB Board decision, *Hispanics United of Buffalo*, the NLRB Board held that a non-union employer's termination of five employees for Facebook postings was unlawful and awarded the employees full reinstatement with back pay.⁷⁰ Upholding an ALJ's decision that the terminations violated the NLRA, even without CBA coverage or active union involvement, the NLRB concluded that the posts were protected as a "first step toward taking group action."⁷¹ The NLRB then determined that when analyzing protected communication, the analysis of whether comments were made online, by way of social media, or "around the water cooler" was irrelevant because the only relevant issue is whether the communications equated to "concerted" activity.⁷² Using the analysis of "concerted activity" under the NLRA, the NLRB Board held that an employees' social media postings would be protected if: 1) the employee's supervisor knew the activity was concerted, 2) the employer was shown the postings; 3) the postings qualified as "protected" under the NLRA; and 4) the postings motivated the terminations.⁷³ The Board further reasoned that the employees' postings in the case warranted protection because all four factors were established.⁷⁴ By finding the online communication protected under the

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 16.

⁷⁰ *Hispanics United of Buffalo, Inc.*, No. 03-CA-027872, 2012 N.L.R.B. Lexis 852 (Dec. 14, 2012) (describing an employee who regularly discussed workplace activities and management decisions via text messaging and openly criticized a co-worker for poor performance on her Facebook page with the following Facebook post: "Lydia Cruz, a coworker feels that we don't help our clients enough at [HUB]. I about had it! My fellow coworkers how do u feel?").

⁷¹ *Id.* at 14.

⁷² *Id.* at 13.

⁷³ *Id.*

⁷⁴ *Id.* at 14.

NLRA, the NLRB set a precedent that social media postings could be protected “water cooler conversations” even when the posting employees were not unionized, if the activity qualified as “concerted.”⁷⁵

Applying the NLRB’s analysis from *Costco Wholesale Corp.*, an NLRB administrative law judge in *Echostar Technologies* held EchoStar’s social media policy also violated the NLRA.⁷⁶ EchoStar’s policy, which was similar to Costco’s, prohibited employees from making “disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or ... their products/services.”⁷⁷ In evaluating the policy, the ALJ stated that the applicable analysis under *Costco* was whether a work rule violates § 8(a)(1) of the NLRA such that the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.⁷⁸ If the policy does not facially impinge Section 7 rights, the:

violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.⁷⁹

The ALJ determined that EchoStar’s policy impeded employees’ rights under the NLRA because even when viewed with other employee handbook provisions, which encouraged employees to use good judgment in social networking posts, stated that policies would be applied in a manner consistent with the law, and referred employees to human resources with any questions, employees would reasonably construe this rule as one prohibiting Section 7 activity.⁸⁰

⁷⁵ *Id.* at 13.

⁷⁶ *Echostar Techs., L.L.C.*, No. 27-CA-066726, 2012 N.L.R.B. Lexis 627 (Sept. 20, 2012).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*; see *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646, 647 (2004) (discussing the analysis to be used for determining the presence of concerted activity).

⁸⁰ *Echostar Techs., L.L.C.*, 2012 N.L.R.B. Lexis 627.

These decisions demonstrate that while the NLRB will recognize an employer's legitimate interest in preserving its image, protecting confidential information, managing good-will, or customer relations, the employer's social media policy must balance the employers' interest with the employees' competing rights before it will be found lawful. The reasoning in these cases also demonstrates that the NLRA will be construed to protect employees' social media actions when these activities relate to group activities or pertain to the terms and conditions of employment.⁸¹ The NLRA will not, however, protect social media activities when irrelevant to group activity, the conditions or terms of employment, or activities consisting of disloyal or disallowed behavior.⁸²

PART V: THE NLRB'S ISSUED GUIDELINES ON SOCIAL MEDIA MANAGEMENT

To combat employers' reasonable confusion over permissible employment decisions on employees' social media activities, the NLRB has issued multiple guidelines on social media policies in three consecutive Operations Management Memoranda.⁸³ Reading the NLRB's issued Memoranda together, employers can

⁸¹ See, e.g., *Knauz BMW, Inc.*, No. 13-CA-046452, 2012 N.L.R.B. Lexis 679, 2 (Sept. 28, 2012) (explaining the "courtesy rule," which prohibited "disrespectful" conduct and "language which injures the image or reputation of the Dealership"); *Costco Wholesale Corp.*, No. 34-CA-012421, 2012 N.L.R.B. Lexis 534, 31 (Sept. 7, 2012) ("statements posted electronically . . . that damage the Company.").

⁸² See *Dish Network Corp.*, No. 16-CA-62433, 2012 WL 5564372 (N.L.R.B. Nov. 14, 2012); *Hyundai Am. Shipping Agency*, No. 28-CA-22892, 2011 N.L.R.B. Lexis 498, 12 (Aug. 26, 2011) (describing a rule threatening discipline for "[p]erforming activities other than Company work during working hours"); *Laidlaw Transit, Inc.*, 315 N.L.R.B. 79, 82 (1994); *Norris/O'Bannon*, 307 N.L.R.B. 1236, 1245 (1992).

⁸³ See *Operations Memorandum: Report of the Acting General Counsel Concerning Social Media Cases* ("OM 12-59"), NATIONAL LABOR RELATIONS BOARD (May 30, 2012), http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM%5C+12; *Operations Memorandum: Report of the Acting General Counsel Concerning Social Media Cases* ("OM 12-31"), NATIONAL LABOR RELATIONS BOARD (Jan. 24, 2012), http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM 12-31; *Operations Memorandum: Report of the*

develop a fairly comprehensive understanding of the NLRB's approach to social media issues and when employment actions resulting from social media use will be permissible under the NLRA.

All three of the issued Operations Management Memoranda emphasize that all employers should very carefully and clearly construct social media policies, because the same rules will apply to all employees regardless of whether they are unionized.⁸⁴ The three Memoranda also highlight, consistent with the NLRB's directive, that social media issues will remain an NLRB enforcement priority.⁸⁵ Since 2011, all "[c]ases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter" must be submitted to the NLRB's Division of Advice.⁸⁶ The Memoranda further show that the Acting General Counsel ("AGC") of the NLRB continues to find most challenged employer social media policies unlawfully broad under the NLRA because employees could "reasonably construe" them as restricting employees' Section 7 rights to communicate with each other or third parties regarding wages, hours, and working conditions.⁸⁷ In the AGC's review of twenty social media policies, for the development of the three Operations Management Memoranda reports, only four of the policies were found to be lawful.⁸⁸ The low passage rate of employer-developed social media policies demonstrates that employers struggle with creating social media policies that do not impinge upon employees' protected activities.⁸⁹

Consistent with the established legal rule from the NLRB's decision in *Lutheran Heritage Village-Livonia* in 2004, the NLRB states in the *Report of the Acting General Counsel concerning Social Media Cases*, that when conducting an

Acting General Counsel Concerning Social Media Cases ("OM 11-74"), NATIONAL LABOR RELATIONS BOARD (Aug. 18, 2011), [http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM 11-74](http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM%2011-74) [hereinafter "N.L.R.B. Operations Memoranda"].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ N.L.R.B. General Counsel Memorandum 11-11 (Apr. 12, 2011) at 2.

⁸⁷ See N.L.R.B. Operations Memoranda, *supra* note 83.

⁸⁸ *Id.*

⁸⁹ *Id.*

analysis of social media policies, the Board will follow a two-step inquiry.⁹⁰ First, the Board will closely examine the language of the social media policy.⁹¹ If the language of the rule explicitly restricts Section 7 activities, the rule will be found unlawful under the NLRA.⁹² If, however, the rule does not explicitly restrict Section 7 activity it may still be unlawful under the second step of the analysis if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."⁹³ The majority of the social media policies analyzed by the AGC under this inquiry have been determined to be unlawful.⁹⁴

While the AGC's guidance in the Operations Management Memoranda seems clear and well defined, ALJ decisions have inconsistently applied the AGC's analysis.⁹⁵ For example, throughout 2012 several ALJs found somewhat vague portions of policies that violated Section 7 of the NLRA consistent with the NLRA, provided the challenged policy contained a brief disclaimer that the employer would administer the policy in compliance with Section 7 of the NLRA.⁹⁶ A large proportion of ALJ decisions have also held, however, that policies containing a disclaimer may be unlawful if excessively broad or vague.⁹⁷

⁹⁰ *Acting General Counsel issues second social media report*, NATIONAL LABOR RELATIONS BOARD (Jan. 25, 2012), <http://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-issues-second-social-media-report>.

⁹¹ *Id.*

⁹² *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646 (2004); *see also* N.L.R.B. Operations Memoranda, *supra* note 83.

⁹³ *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. at 647.

⁹⁴ *See* N.L.R.B. Operations Memoranda, *supra* note 83.

⁹⁵ *See* General Motors, L.L.C., No. 07-CA-53570 (N.L.R.B. May 30, 2012) (noting the ALJ rejected the analysis of the AGC and upheld the employer's challenged social media policy under the NLRA).

⁹⁶ *See* G4S Secure Solutions (USA) Inc., No. 28-CA-23380 (N.L.R.B. Mar. 29, 2012) (finding parts of a social media policy unlawful but upholding restriction on posting photos of uniformed employees based on employer privacy concerns); Triple Play Sports Bar & Grille, Nos. 34-CA-12915 & 34-CA-12926 (N.L.R.B. Jan. 3, 2012) (rejecting argument that social media policy prohibiting "inappropriate" communications was unlawful).

⁹⁷ *See e.g.*, Cent. Peninsula Hosp., Inc., No. 19-CA-32835, 2012 WL 3144634 (N.L.R.B. Aug. 2, 2012) (finding that policy prohibiting serious misconduct

While employers might be confused by the apparent inconsistency in ALJ decisions and the AGC's guidelines, the AGC's Memoranda contain the clearest guidance available to employers on when a social media policy will be found lawful under the NLRA. Based on the AGC's guidelines, an employer's social policy should include the following elements:

1. Clear articulated need for the employer to place restrictions on an employee's social media use;
2. Detailed notification to employees that even though there is a social media policy in place, the employee is free to express his or her views and opinions on social media but must accept whatever consequences arise from posting such information;
3. Concrete definition of social media, which includes specific examples of the types of information that an employee is not permitted to disclose for business or legal reasons (i.e. confidential information or trade secrets);
4. Definition and specific examples of communication that will be prohibited as offensive or against the company's policy of anti-discrimination, harassment or bullying; and
5. A clearly worded statement that the policy will not be applied in a way that restricts an employee's use of social media to engage in protected activities.⁹⁸

To ensure that the policy is not overly broad or vague under the AGC's guidelines, employers should spend an adequate amount of time thinking about the business purpose behind their social media policy and the specific type of social media use the policy will be aimed at preventing. The employer should then articulate the prohibited social media use in clear and unambiguous language. Employers should also emphasize to employees, both in the policy and during policy training, that the company's social media policy is not an infringement on their protections under the NLRA, or other federal labor laws, and therefore only

outside of company operations, including conduct on social media outside of the workplace, was overly broad and unlawful); *General Motors, L.L.C.*, No. 07-CA-53570 (finding that even though "offensive, demeaning, abusive, or inappropriate remarks are as out-of-place online as they are offline" some parts of the social media policy were overly broad and therefore unlawful under the NLRA); *Triple Play Sports Bar & Grille*, Nos. 34-CA-12915 & 34-CA-12926 (rejecting argument that social media policy which prohibited "inappropriate communications" was unlawful under the NLRA).

⁹⁸ See N.L.R.B. Operations Memoranda, *supra* note 83.

prohibits social media use that is both harmful to the business and constitutes an unprotected activity.

PART VI: THE IMPLICATIONS OF THE NLRB'S SOCIAL MEDIA POLICY

Section 7 of the NLRA gives employees the right to form, join, or assist labor organizations and the right to engage in other concerted activities for the purpose of collective bargaining, other mutual aid, or protection.⁹⁹ Even in union-free environments, the NLRA prevents disciplining or terminating an employee for employee complaints about hours, pay, treatment, or working conditions.¹⁰⁰ The relationship between an employee's statement on social media and the employee's Section 7 rights is therefore critical to the determination of whether an employment policy prohibiting certain posts, or an employment action taken in response to social media posts, is permissible under the NLRA.

Even though the continual blurring of personal and professional identities from the disappearing boundaries between work and home¹⁰¹ frustrates the analysis of when an individual is engaging in protected activity, under the NLRB's guidance, some specific policies are known to be unlawful.¹⁰² In fact, the guidelines make it exceedingly obvious that social media policies, if challenged, will be found unlawful when they are overly broad, restrict all confidential information, confine peaceful relations amongst staff (i.e., a policy which prohibits discussing work conditions, either verbally or in an online format, violates employees' Section 7 rights), or broadly protect an employer's image.¹⁰³ The guidelines also concretely establish that before a social media policy will be found consistent with the NLRB's guidelines and the NLRA's protection of Section 7 rights, the policy must openly allow for employees to discuss improving working

⁹⁹ National Labor Relations Act, 29 U.S.C. § 157 (2006).

¹⁰⁰ *Id.*; see also *Jones & Carter, Inc.*, No. 16-CA-027969, 2012 WL 5941221, 16 (N.L.R.B. Nov. 26, 2012), *aff'd*, No. 16-CA-027969, 2013 WL 754064 (N.L.R.B. Feb. 8, 2013) (citing *Taylor Made Transp. Servs.*, 2012 WL 2069673 (N.L.R.B. June 7, 2012)).

¹⁰¹ See Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI. KENT L. REV. 901, 908 (2012).

¹⁰² Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 994-96 (2012).

¹⁰³ See N.L.R.B. Operations Memoranda, *supra* note 83.

conditions and participate in concerted activities on social media sites.¹⁰⁴ The guidelines further establish that employers are allowed, under the NLRA, to enact social media policies that ban negative behavior, harassment, discrimination, retaliation, and bullying, so long as these policies do not discourage “concerted activity.”¹⁰⁵

The NLRA's protection of “concerted activity” encompasses such activities as employee discussions about pay, working conditions, and safety concerns.¹⁰⁶ As the NLRA’s protection of “concerted activities” applies regardless of whether employees are organized under a CBA, all employers must balance the prohibition of unwanted conduct (i.e., such as revealing confidential information or making disparaging comments about the company) against preventing an undue restriction on employees’ protected or “concerted activities.”¹⁰⁷ Although the NLRB has broadly construed “concerted activities” to include group actions, such as raising group complaints, stopping work to protect work conditions, refusing to work late, protesting discriminatory conditions at work, and supporting a fellow employee’s complaint, not all concerted activity is protected.¹⁰⁸ At a minimum, “concerted activity” must involve employees’ relations with an employer to constitute or relate to a labor dispute.¹⁰⁹ Under the NLRA requirements for a labor dispute, there must in turn be a controversy concerning terms, tenure, or conditions of employment.¹¹⁰ No matter where the employees’ activity is engaged in, be it online or within the workplace, when the activity is outside the scope of conditions and terms of

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; see also Sprague, *supra* note 101.

¹⁰⁶ National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2006).

¹⁰⁷ Concerted activity has often been found to encompass conduct that involves the authority of employees within the bargaining unit or on behalf of other employees. Concerted activity therefore includes many different types of activities. See generally *Notes and Decisions to the National Labor Relations Act*, 29 U.S.C. § 158(a)(1).

¹⁰⁸ 29 U.S.C. § 158(a)(1); see also, Marka B. Fleming, *Punishing Employees for Using Social Media Outside the Scope of their Employment: What are the Potential Legal Repercussions to the Private Employer?*, 18 ALSB JOURNAL OF EMPLOYMENT AND LABOR LAW 13 (2012).

¹⁰⁹ See *Nat'l Labor Relations Bd. v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962).

¹¹⁰ *Id.*

employment, the activity will not be considered a protected “concerted activity” under the NLRA.¹¹¹

With the NLRB’s social media guidance, employers are equipped with a baseline structure for developing lawful social media policies, but still have no explicit test for determining what constitutes protected social media activity under Section 7. Additionally, even if an employer has a very strong, unambiguous social media policy, employees may not fully understand their right to utilize social media to discuss workplace issues or when a discussion of workplace issues on social media will be appropriate.¹¹² Employers may also be unable to determine when an employee’s disparaging remarks on social media are protected under Section 7 or when they may monitor social media use outside of the workplace, because although the NLRB allows termination for inappropriate social media use, the full context for when social media monitoring will be considered inappropriate is unclear.¹¹³ The NLRB’s guidelines also fail to adequately address employers’ main concern in managing the disclosure of confidential or discussion of protected information on social media because broadly worded policies aimed at protecting this form of information have largely been interpreted to impinge employees’ Section 7 rights.¹¹⁴

¹¹¹ 29 U.S.C. § 152 (9); *see also* *Washington Aluminum Co.*, 370 U.S. at 16.

¹¹² *See* Sprague, *supra* note 101 (providing in response to a Freedom of Information Act (FOIA) request to the NLRB, the NLRB sent a collection of documents, which included copies of 109 charges, which showed differing interpretations of when employees had engaged in protected activity under the NLRA).

¹¹³ *See* Alessi, *supra* note 31 (discussing the recent trend of employers requiring social media passwords and monitoring social media use both at work and at home); *see also* *Hispanics United of Buffalo*, No. 03-CA-027872, 2012 N.L.R.B. Lexis 852 (Dec. 14, 2012) (discussing how the Employer lawfully terminated an employee for inappropriate social media use and providing an example of when the employer would not have been able to terminate the employee).

¹¹⁴ *See* N.L.R.B. Operations Memoranda, *supra* note 83. *See generally* *N. Ind. Pub. Serv.*, 347 N.L.R.B. 210 (2006) (emphasizing an employer’s legitimate interest in protecting confidential information); *Fleming Cos.*, 332 N.L.R.B. 1086 (2000); *Anheuser-Busch, Inc.*, 237 N.L.R.B. 982 (1978).

PART VII: THE RESPONSE OF EMPLOYERS TO THE NLRB'S SOCIAL MEDIA GUIDELINES IN ENACTING SOCIAL MEDIA POLICIES

While employers have quickly recognized the risks involved with employees discussing employment-related issues on social media, these risks are often old news as many social media risks are common to other forms of communication.¹¹⁵ Traditionally, employers have used corporate policies to successfully manage employee communication risks.¹¹⁶ For example, company policies on external communication have efficaciously prevented the disclosure of confidential information or misrepresentation of the company.¹¹⁷ In fact, the achievement of corporate policies in efficiently and effectively controlling communication risks has led to social media policies becoming the primary tool for employers to manage social media communication risks.

Many employers therefore recognize the necessity for having a social media policy, but do not know how to develop a social media policy that is consistent with current employment laws and NLRB guidelines. Crafting lawful and enforceable social media policies therefore remains a challenge for both union and non-union employers alike.¹¹⁸ The continued advancement of social media technology along with a variety of different competing federal and state laws, which attempt to manage how social media factors into the employment relationship, only add to employers' confusion.¹¹⁹ Additionally, while many employers feel that any social media policy would be better than no policy, many are unsure of how federal or state regulations directly impact the policy requirements. Employers have therefore attempted to minimize the number of

¹¹⁵ Adam Cohen, *Regulating employee behavior on social media: Recent NLRB decisions underscore that employers must be careful not to overreach in seeking to curb employee social media activity*, INSIDE COUNSEL (Feb. 15, 2013), <http://www.insidecounsel.com/2013/02/15/regulating-employee-behavior-on-social-media-the-l>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ William T. Salzer, *Exploring New Routes to Early Settlement in Employment Law Cases*, 2013 WL 153852 (ASPTORE), *1 (providing many employers fail to recognize that Section 7 of the NLRA applies not only to the unionized environment, but also the non-union employer).

¹¹⁹ See generally Gordon, *supra* note 41.

factors impacting social media policies by proactively designing their social media policies to be consistent with the NLRB's established guidelines.¹²⁰

Compliance with the guidelines does not however, mean that the employers agree with the NLRB's stance on social media activities. In fact, many employers view the NLRB's decision in *Costco* as an expansion of employee rights because the NLRB seemingly used a more elaborative reading of the protection of "concerted activity" to extend to social media activity.¹²¹ This is because, under *Costco*, even if employers who have adopted social media policies are aware that their policies may not directly or indirectly chill employees' Section 7 rights, they may still be unable to identify when social media use constitutes concerted activity. Furthermore, because social media use is often viewed through a subjective lens, the line between plain angry, incensed, and disparaging comments, and a protected activity in social media cases is blurry at best.¹²²

In contrast to *Costco*, some employers viewed the NLRB's decision in *Knauz BMW* positively because the NLRB's decision was limited in scope and

¹²⁰ Kramer Levin, *The NLRB Gives All Employers Cause for Concern*, EMPLOYMENT LAW UPDATE (July 2012), available at <http://www.kramerlevin.com/files/Publication/aba0130d-964b-4c0a-a62a-2800d2473e59/Presentation/PublicationAttachment/f55f07c0-ea4e-405d-a3c0-28f889a4e3da/Employment%20Law%20Update%20July%202012.pdf>.

¹²¹ Steven Greenhouse, *Even if It Enrages Your Boss, Social Net Speech Is Protected*, THE NEW YORK TIMES (Jan. 21, 2013), <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all>; see also Jacqueline Scott, et. al., *Social Media Update: NLRB's Acting General Counsel Issues Further Guidance*, 9 NO. 11 FED. EMP. L. INSIDER 5 (Jan. 2012) (arguing under the AGC's guidelines, all but the most narrowly drafted policy provisions may be unlawful. Consequently, to comply with the NLRA, employers should include very narrow restrictions on only specific social media activities, taking care not to restrict activities that a reasonable employee would view as protected concerted activities. As a final consideration, a boilerplate "savings clause" may be helpful but will not otherwise validate an unlawful policy under the NLRA).

¹²² Frank L. Day, *The NLRB's Expanded Agenda at-Will Employment Disclosures, Social Media Policies and Confidentiality Requirements May Be Illegal*, 49 TENN. B.J. 28, 31 (2013) (arguing the AGC's position suggests any rule where an employee could construe the rule restricted Section 7 rights, the rule would be unlawful).

upheld the employer's termination of a salesman for inappropriate social media use. The Board's decision in *Knauz BMW*, however, did not fully define an employer's right to control or criticize employee activity on the Internet.¹²³ Employers are therefore left wondering when an employee's publically displayed online behavior, which may be damaging to the company, is actionable because if the activity concerns workplace conduct, it may or may not be protected under the NLRA.

Attempting to comply with NLRB guidelines, employers have instituted several key elements into enacted social media policies: 1) a clearly worded policy that is not ambiguous and does not contain broad restrictions, 2) clear examples of prohibited conduct, and 3) a "savings clause" which ensures employees know they may use social media to participate in protected Section 7 activities.¹²⁴ Even when limits on social media use are clearly worded, however, both employees and employers remain feeling uncertain about what their rights are within the social media sphere due to continued expectations of privacy and the separation of personal and professional lives.

**PART VIII: ADJUSTING THE NLRB POLICY
TO ENSURE EMPLOYER'S CONCERNS ARE
ADDRESSED WHILE ENSURING EMPLOYEE
RIGHTS ARE NOT DIMINISHED**

Even though the NLRB explicitly recognizes an employer's interest in preserving confidential information and managing good will, reputation, or customer relations, the NLRB's current social media guidelines may not adequately balance the rights and interests of both employers and employees in social media use.¹²⁵ For example, many employees do not feel their privacy rights and Section 7 rights are adequately protected because even with restrictions under the NLRA, the NLRB permits employers to monitor and base employment related decisions on an employee's social media activities. Similarly, because the NLRA does not protect an employee's right to engage in speech that does not qualify as a

¹²³ Salzer, *supra* note 117, at *8.

¹²⁴ Michael A. Sands, et. al., *Social Media Policies And The NLRB: What Employers Need To Know*, FENWICK AND WEST (Mar. 1, 2013), <http://www.fenwick.com/Publications/Pages/Social-Media-Policies-And-The-NLRB-What-Employers-Need-To-Know.aspx>.

¹²⁵ See generally Russell, *supra* note 36, at 32.

concerted activity or an employee's privacy in social communication, many employees engaging in personal and presumed private social media activities are left unprotected.

The difference between an employee's expectation and an employer's expectation of protection with regard to social media use presents an example of the NLRB's gap in coverage. The gaps of coverage can be analyzed in three important contexts, political speech, speech related to work conditions, and speech intended to remain purely private. The types of employees engaging in political speech, public employees or private employees, are provided different protection for political speech.¹²⁶ Under the First Amendment, public employees are protected from discharge for political speech, but employees working for private entities will not be protected from discharge unless the political speech engaged in is protected by the NLRA.¹²⁷ Private employers utilizing traditional at-will employment practices may therefore discipline employees for a much broader range of speech occurring on social media, regardless of the employee's expectation to privacy, provided the employer does not violate the NLRA or a public policy exception to the at-will employment doctrine.¹²⁸ A private employer's ability to terminate employees based on political posts or social media activities is a distinctive gap in protection of employee communications, because most employees expect their political discussions on social media applications to be private and protected from employer action.¹²⁹

¹²⁶ Knapp et. al., *Burlington, Know the Rules of Engagement When Employees Talk Politics at Work*, 17 NO. 8 VT. EMP. L. LETTER 6 (Oct. 2012) (discussing the different employment laws applying to political speech in the workplace).

¹²⁷ Ann C. McGinley et. al, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 81-82 (2012).

¹²⁸ See generally Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire A Notable Warrior?*, 61 MERCER L. REV. 551 (2010) (discussing the public policy exceptions for at-will employment which provides that employment may not be terminated on an at-will basis if that action would go against public policy. While each state determines public policy exceptions in general, an employment action that would go against public policy would be injurious to the public or could cause harm).

¹²⁹ See generally Steven D. Zansberg & Janna K. Fisher, *Privacy Expectations in Online Social Media—An Emerging Generational Divide?*, 28 COMMUNICATIONS LAWYER (Nov. 2011), available at

The next context for consideration is speech related to working conditions. Often, it is difficult to determine whether an individual is discussing workplace conditions or merely venting workplace frustrations. Consider two examples: 1) an employee was upset about a tip sharing policy, which she felt was unfair, and posted several complaints on Facebook, and 2) an employee, through a series of comments on Facebook, discussed her manager's recent decisions at work. In determining whether these types of comments are protected under the NLRA, the NLRB assesses a number of factors related to the context of the communication.¹³⁰ The NLRB first considers whether the communication is somehow related to the workplace by determining if it concerns, or is related to, the terms and conditions of employment.¹³¹ Next, the NLRB considers whether other employees joined or participated in the conversation.¹³² If an employee's comments are made for the purpose of eliciting conversation or initiating a group dialogue, the communication will likely be viewed as protected.¹³³ The third factor considered by the NLRB is whether the comments relate to previously raised concerns.¹³⁴ If the employee's comments discuss a repeatedly raised issue, the comment will more likely be viewed as protected.¹³⁵ Finally, the NLRB considers whether the conversation is purely personal or more relative to the group as a whole.¹³⁶ Online comments, which are purely personal, such as personal opinions or individual rants, will less likely be protected activities.¹³⁷

Returning to the two examples listed above, it is evident that a subjective viewing and manipulation of these factors could drastically alter the protection, or lack of protection, that would be provided under the NLRA. If the individual in example one posted her comment in a purely personal way without intending to discuss the tipping policy, had not raised the issue previously, and did not receive any comments from her coworkers, she would not obtain protection under the

[http://www.lskslaw.com/documents/evolvingprivacyexpectations\(00458267\).pdf](http://www.lskslaw.com/documents/evolvingprivacyexpectations(00458267).pdf) (discussing the expectation of privacy some Facebook users have in political posts and private posts made on their personal social media pages).

¹³⁰ N.L.R.B. Operations Memoranda, *supra* note 83.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

NLRA.¹³⁸ Alternatively, if the individual in example two had raised her concerns about the manager's decision multiple times, frequently elicited conversations with coworkers verbally and online, and had an active stream of comments from coworkers on her Facebook page; she would likely obtain coverage under the NLRA.¹³⁹ Even if both individuals intended to communicate the same thing, specifically that a particular work practice is unfair, because of the tiny variation of several factors, one individual's communication is protected, but the other's is not.

The last context of consideration is speech shared on social media platforms that is intended to remain private or be shared with only a specific group of individuals. The NLRB does not provide any protection for speech shared on social media platforms that is intended to be private because the NLRB guidelines assume the employer has access to the employee's social media information through publically posted information or employee granted access. A trickier situation, and one which is not specifically addressed by the NLRB guidelines, is protection of employees who post information on social media that is only intended for a specific audience, or is intended to be private and not for the general public.¹⁴⁰

With such large gaps in coverage of social media use, the NLRB's guidance on social media policies leaves employers frequently confused about how to structure or enforce social media policies. The NLRB's guidance also fails to account for an employee's expectation of privacy in social media by inadequately addressing employee concerns over social media use that is meant to be private or shared with only a select group of people. The inadequacies in the NLRB's guidance in effect creates a lose-lose for both employers and employees with neither party truly understanding their rights, obligations, or protections under the NLRA. Furthermore, because the NLRB's stance on social media allows employers to monitor and analyze an employee's social media use without offering concrete examples of when this conduct is acceptable, the NLRB's current guidance fails to adequately address employers' social media concerns while also

¹³⁸ Leslie Hayes & Sally J. Cooley, *Social Media - Striking the Balance Between Employer and Employee*, 55 THE ADVOC. 22, 25 (2012).

¹³⁹ *Id.*

¹⁴⁰ See Susan C. Hudson, et. al., *Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 784 (2012) (discussing how case law distinguishes between social media postings to the general public and postings to social media sites that are password protected, or protected in other ways to shield unauthorized users from viewing the posted content).

diluting employees' rights to privately communicate regarding workplace concerns.

PART IX: CONCLUSION

Social media is a present, pervasive, and complex issue in the workplace that will likely only continue to be used for workplace purposes, during company time, or with company owned equipment. As employers have a legitimate interest in controlling employees' social media use for the purposes of limiting disclosure of company information and protecting the company's image, social media use policies will also likely continue to be the primary tool for management of social media use. While the NLRB's recent decisions and issued guidance provides clear direction for employers to develop social media policies, the NLRB's stance fails to fully protect employees' Section 7 and privacy rights. The NLRB's guidance also fails to fully address employers' concerns of employee disclosure of confidential or private information because the AGC and NLRB have determined broadly worded policies related to these topics will likely be found unlawful. Finally, while the NLRB's guidance offers the best available tool for employers to develop social media policies, employers should continue to remain cognizant of employee expectations for privacy and changing employment laws to ensure their policies are not overly broad, unlawfully restrictive, or intrusive.